

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE,
WENDY HARRIS, DAVID STALHEIM, AND
FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY,

Respondent.

Case No. 12-2-0013

COMPLIANCE ORDER:

**FINDING CONTINUING
NONCOMPLIANCE, EXTENDING
COMPLIANCE SCHEDULE,
SUPPLEMENTING THE RECORD
AND
DENYING INVALIDITY**

On June 7, 2013, the Board found Whatcom County's Ordinance 2012-032 did not comply with RCW 36.70A.070(5) because the County failed to include measures in the Rural Element of its Comprehensive Plan protecting surface and groundwater quality, water availability, and water for fish and wildlife.¹ The June 2013, Final Decision and Order established a compliance deadline of December 4, 2013, and set a compliance hearing January 21, 2014.

I. PROCEDURAL HISTORY

On November 15, 2013, Whatcom County submitted a Motion for Continuance of the Compliance Date. On November 25, 2013, Petitioners Hirst, et al. filed a motion to Supplement the Record and a Petition to Impose Invalidity as to certain development regulations. On December 2, 2013, the Board issued an order setting a compliance hearing for December 18, 2013, to discuss the motions. On December 3, 2013, the County filed an Amended Reply in Support of Motion for Continuance and Response to Petition for Invalidity. On December 13, 2013, Petitioners filed a Motion to Supplement the Record with

¹ *Hirst v. Whatcom County*, Case No. 12-2-0013, Final Decision and Order (FDO) (June 7, 2013) at 12 and 37-42.

1 rebuttal evidence in support of invalidity. On the same day, the County filed its Initial
2 Response to the Motion to Supplement. On December 18, 2013, the Board held a
3 telephonic compliance hearing.
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5 **II. BOARD DISCUSSION**

6 ***Finding of Continuing Non-Compliance and Extension of Compliance Schedule***

7 The Board finds as follows: The June 7, 2013, Final Decision and Order (FDO) set a
8 December 4, 2013, date for the County to take action to comply. The County acknowledges
9 it has not yet taken such action. The County indicates their Council will hold its next
10 meeting on January 13, 2014, and will subsequently consider action to comply with the
11 FDO.
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13 **The Board finds and concludes Whatcom County has not taken any action to**
14 **achieve compliance with the GMA since the June 7, 2013, Final Decision and Order;**
15 **and thus the Board finds the County in continuing non-compliance with the Growth**
16 **Management Act.** The Board grants an extended compliance schedule.
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18 ***Motion to Supplement the Record***

19 Both parties here have provided additional evidence and documentation pertaining to
20 the County's delay in compliance and the development activity in the County. The Board's
21 rules indicate evidence arising subsequent to the adoption of challenged legislation may be
22 allowed when such evidence is necessary to the Board's decision concerning invalidity.
23 (WAC 242-03-565(2)) The Board may also allow a later motion for supplementation on
24 rebuttal or for other good cause. (WAC 242-03-565(1)).
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26 Petitioners' Exhibit A is a list of land division applications filed in 2013. Petitioners
27 explain this information is necessary for the Board to consider because it shows the number
28 of land divisions being made under non-GMA compliant policies and regulations. The
29 Board finds Exhibit A necessary and of substantial assistance in reaching its decision, as
30 specified in RCW 36.70A.290(4) and **ADMITS** Exhibit A to supplement the record.
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1 Exhibit B is a supplemental budget request by the County Health Department to
2 address increasing workload for septic tank installations. Petitioners argue this “establishes
3 an increase in the amount of non-urban development dependent on septic tanks.”²
4 However, Petitioners have not explained the link between the budget request and, as the
5 County explains, “to increase the projected 2012 revenue over the estimated budget
6 amount – not to request additional funds for on-site sewage system (OSS) permitting.”³ The
7 Board cannot determine if a supplemental budget request implies GMA non-compliance.
8 The Board **DOES NOT ADMIT** Exhibit B to supplement the record.
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10 Exhibits C, D, and E are emails to the public about a Planning Commission meeting
11 December 12, 2013, regarding water resources and a staff report to the Planning
12 Commission about GMA requirements for measures to be included in the comprehensive
13 plan to protect water resources. Each of these three exhibits includes the statement from
14 the County that “No new regulations or changes to existing regulations are being
15 proposed.”⁴ This statement assists the Board in verifying that the County did not take action
16 to comply with the Board’s June 7, 2013 FDO. The Board finds Exhibits C, D, and E are
17 necessary and of substantial assistance in reaching its decision, as specified in RCW
18 36.70A.290(4) and **ADMITS** Exhibits C, D, and E to supplement the record.
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21 ***Finding of Non-Compliance and Request for Invalidity***

22 Pursuant to RCW 36.70A.302, the Board has the authority to invalidate all or part of a
23 comprehensive plan or development regulation. RCW 36.70A.302(1) provides:

24 A board may determine that part or all of a comprehensive plan or
25 development regulations are invalid if the board:

26 (a) Makes a finding of noncompliance and issues an order of remand under
27 RCW 36.70A.300;

28 (b) Includes in the final order a determination, supported by findings of fact
29 and conclusions of law, that the continued validity of part or parts of the plan
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31 ² Hirst, et al.’s Motion to Supplement the Record of Whatcom County’s Motion for Continuance at 2 (December
32 13, 2013).

³ County’s Additional Response to Motion to Supplement the Record (December 20, 2013) at Ex. 1 at 1.

⁴ Hirst, et al.’s Motion to Supplement the Record of Whatcom County’s Motion for Continuance, Exs. C and D
at 1 (December 13, 2013).

1 or regulation would substantially interfere with the fulfillment of the goals of
2 this chapter; and
3 (c) Specifies in the final order the particular part or parts of the plan or
4 regulation that are determined to be invalid, and the reasons for their
5 invalidity.

6 Under RCW 36.70A.330(4), at a compliance hearing the board shall also reconsider its final
7 order and decide, if no determination of invalidity has been made, whether one now should
8 be made under RCW 36.70A.302.

9 Petitioners ask the Board to invalidate a number of development regulations
10 concerning permit-exempt wells, on-site septic systems (OSS), and stormwater
11 management. With Ordinance 2013-032, Whatcom County incorporated these regulations
12 by reference into the rural element of its comprehensive plan in an effort to include
13 measures to protect surface and groundwater resources as required by RCW 36.70A.070
14 (5)(c)(iv). Petitioners objected that the County's pre-existing regulations failed to protect
15 water quantity and quality and did not meet the statutory mandate. Petitioners argue the
16 Board must impose invalidity based on substantial interference with GMA Goal 9 (Open
17 space and recreation) and Goal 10 (Environment). They maintain the County's policies and
18 regulations interfere with the goal of conserving fish and wildlife habitat, fail to protect water
19 quality and the availability of water.⁵

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21 The Board's June 7, 2013, FDO analyzed the County's comprehensive plan
22 amendments in light of the Supreme Court's *Kittitas County* ruling that "the statutory
23 language of the GMA is clear that protective measures *shall* be included in the Plan."⁶
24 According to the *Kittitas* Court, the Rural Element must use directive language that ensures
25 protection of rural areas.⁷ The measures must "limit development so it is consistent with
26 rural character and not characterized by urban growth."⁸ The FDO concluded that several
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30 ⁵ Hirst et al.'s Response to Whatcom County's Motion for Continuance of Compliance Date and Petition for
31 Determination of Invalidity (November 25, 2013) at 10. Petitioner's Supplement to Petition for Invalidity,
32 Attachment 1, Invalidity Response Matrix (December 20, 2013).

⁶ *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 164, 256 P.3d
1193 (2011).

⁷ *Kittitas County*, 172 Wn.2d at 163.

⁸ *Id.* at 167.

1 comprehensive plan policies adopting, by reference, pre-existing regulations failed to limit
2 development to protect water resources.⁹ However, focusing on the deficiencies of these
3 pre-existing development regulations, as Petitioners urge, may distract from the adoption of
4 comprehensive plan measures that genuinely limit development to protect rural character in
5 Whatcom County.

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7 Whatcom County Ordinance 2013-032 adopted comprehensive plan policies in an
8 attempt to establish “measures” to protect rural character. From the evidence in the record,
9 the Board found and concluded the County’s Comprehensive Plan did not comply with RCW
10 36.70A.070(5) because the County failed to include measures in the rural element of its
11 comprehensive plan protecting surface and groundwater quality, water availability, and
12 water for fish and wildlife.¹⁰ The County must comply by strengthening its plan and
13 development regulations to protect water quality, the supply of water resources, and
14 conserving fish and wildlife habitat; but the Board cannot impose invalidity on pre-existing
15 development regulations. The Board’s authority to invalidate adopted plans and regulations
16 is strictly limited by statute.¹¹ Previously enacted regulations not challenged within sixty
17 days are not within the Board’s reach but, if they are deficient, they do not constitute the
18 measures required by RCW 36.70A.070(5)(c)(iv).
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20 That said, since no legislative action has been taken since issuance of the FDO, the
21 Board finds the existing development regulations continue to lack sufficient regulatory power
22 to protect water quality and quantity and protect fish and wildlife. In sum, as stated in the
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25 ⁹ *Hirst v. Whatcom County*, Case No. 12-2-0013, Final Decision and Order, (June 7, 2013) (hereafter FDO) at
26 35-44. See e.g.: Policy 2DD-2.C.1 cross-referencing WCC 16.16: “This rural element policy does not limit
27 development so as to protect water resources.” FDO, at 36. Policy 2DD-2.C.2 cross referencing WCC 24.05:
28 “The Board does not find that this rural element policy is a measure that limits development to protect water
29 resources.” FDO, at 38. Policy 2DD-2.C.6 cross referencing WCC 21.04.090 and 21.05.080: “Policy 2DD-
30 2.C.6 does not govern development in a way that protects surface water flows.” FDO at 41.

31 ¹⁰ FDO at 44. “The Board finds the Rural Element amendments adopted by Whatcom County in Ordinance
32 No. 2012-032 and Policy 2DD-2.C do not constitute measures to protect rural character by protecting surface
water and groundwater resources. The Petitioners have met their burden of demonstrating the County has
failed to comply with RCW 36.70A. 070(5)(c). The Board is left with a firm and definite conviction that a
mistake has been made. Ordinance No. 2012-032 is clearly erroneous in view of the entire record before the
Board and in light of the goals and requirements of the Growth Management Act.”

¹¹ RCW 36.70A.302. And see, *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn.App. 148, 158-162, 244
P.3d 1003 (2010), holding GMHB’s authority to impose invalidity is narrowly construed and cannot be
expanded based on remedies that the judiciary has fashioned for violation of SEPA.

1 FDO, the County is left without Rural Element measures to protect rural character by
2 ensuring land use and development patterns are consistent with protection of surface water
3 and groundwater resources throughout its Rural Area. This is especially critical given the
4 water supply limitations and water quality impairment documented in this case and the
5 intensity of rural development allowed under the County's plan.¹²

6 The FDO pointed to the importance of protecting surface water flows and
7 groundwater quantity and quality through controls on location, density, and intensity of rural
8 development. Such measures must "limit development so it is consistent with rural
9 character," as the *Kittitas* Court said. In the FDO the Board provided numerous
10 suggestions:¹³

11 The record shows that the County has many options for adopting measures
12 to reverse water resource degradation in its Rural Area through land use
13 controls. As is discussed by state agency reports and the County's own
14 Comprehensive Plan, the County may limit growth in areas where water
15 availability is limited or water quality is jeopardized by stormwater runoff. It
16 may reduce densities or intensities of uses, limit impervious surfaces to
17 maximize stream recharge, impose low impact development standards
18 throughout the Rural Area, require water conservation and reuse, or develop
19 mitigation options. The County may consider measures based on the
20 strategies proposed in the Puget Sound Action Agenda, the WRIA 1 process,
21 WDFW's Land Use Planning Guide, Ecology's TMDL or instream-flow
22 assessments, or other ongoing efforts. It may direct growth to urban rather
than rural areas.

23 Thus, while revisions to the cross-referenced regulations found deficient by the Board
24 and proposed for invalidity by Petitioners will certainly be useful, the County needs to take a
25 broader look at its rural element in order to adopt measures governing development that are
26 consistent with protection of surface and groundwater resources as required by RCW
27 36.70A.070(5)(c)(iv). The Board notes that in achieving compliance with measures to
28 protect Lake Whatcom, the County addressed the location, density and intensity of rural
29 development. For Lake Whatcom, the County:

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¹² FDO at 43.

¹³ FDO, at 43, emphasis added.

- identified the unique vulnerability of the Lake as the primary source of its urban drinking water;
- reduced allowed rural densities;
- eliminated the RRDO – Rural Residential Density Overlay;
- reduced impervious surface allowance from 20% to 10% for new development, and
- provided “zero-phosphorus” stormwater regulations.¹⁴

Similar analysis and measures may be required for other rural areas where water availability is inadequate, water quality is impaired or aquatic resources are at risk.

The Board must now consider whether the cited County Code sections (development regulations) substantially interfere with fulfillment of the goals of the GMA to warrant the imposition of invalidity as requested by Petitioners. For example, the County’s self-inspection program for on-site sewage septic systems allows the land owner to monitor their own septic waste. In the record to this case and in its FDO, the Board found numerous references to failing septic systems, resulting water quality degradation, and the difference in compliance rates between professionally inspected systems as compared to home-owner inspected systems.¹⁵ In addition, the homeowner inspection program emphasis on protecting “public health”¹⁶ is appropriate, but protecting “rural character” under the GMA involves a broader focus on maintaining healthy ecosystem processes.¹⁷ Self-inspections by homeowner of their on-site septic system does not constitute adequate protection of surface and groundwater resources in vulnerable watersheds and aquifers as required by RCW 36.70A.070(5)(c)(iv).¹⁸

Next, Petitioners request the Board impose invalidity on many exemptions to drainage plans and permits. The effect of imposing invalidity would be to eliminate the exemptions. Upon review of the numerous exemption sections of the development

¹⁴ Compliance Order, Case No. 11-2-0010c and 05-2-0013 (January 4, 2013) at 51-52; Order Finding Compliance regarding Issue 3, Case No. 11-2-0010c (November 21, 2013), at 15.

¹⁵ FDO at 37, and referenced evidence in the record.

¹⁶ WCC 24.05.010.

¹⁷ See RCW 36.70A.030(15)(a)(d)(g).

¹⁸ Compare, *Futurewise v. Spokane County and Washington State Department of Ecology*, Case No. 13-1-0003c, Final Decision and Order (December 23, 2013), at 48-50, finding the County and Ecology’s deferral to local health district OSS standards addressed human health concerns but failed to provide ecosystem protection and ensure “no net loss of ecological functions” as required by the Shoreline Management Act.

1 regulations for the rural area, the Board notes that the criteria in WCC 12.08.035 (G)
2 Exemptions are vague and could be left to broad interpretation when granting exemptions.
3 For example, in WCC 12.08.035 G.2.B., the County administrator may grant an exemption
4 when “the legislative intent of all Whatcom County regulations is strictly observed.” It is not
5 clear how an administrator will know all legislative intent by County Council members when
6 granting an exemption.
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8 Lastly, the FDO reviewed WCC 21.04.090 and WCC 21.05.080 addressing water
9 supply to assess their adequacy in meeting “measures to protect water quality and
10 quantity.”¹⁹ Petitions requested invalidity for these regulations, but again, the Board cannot
11 retroactively impose invalidity on pre-existing regulations. The Board did, however, note
12 that both regulations allow private water supplies be used when “the water source is ground
13 water *and not* surface water”²⁰ (emphasis added). In effect, this allows the County to grant
14 private wells to use groundwater without analyzing the hydraulic connections to surface
15 water. From evidence in the record and common knowledge of hydraulic continuity, the
16 FDO found that this regulation does not protect water resources if it allows ground water
17 withdrawals without assessing the connection to surface waters where minimum instream
18 flows are not being met.²¹
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20 After reviewing the specific County Code sections referenced above by Petitioners,
21 there is evidence in the record that would support a finding of substantial interference with
22 GMA planning goals. However, the Board must **DENY** the request for a determination of
23 invalidity at this time because the County Code sections that Petitioners reference were all
24 enacted sometime prior to the adoption of Ordinance 2012-032 and were not challenged at
25 that time and, therefore, are not before the Board in this case.
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32 ¹⁹ FDO at 39-40.

²⁰ Whatcom County Code WCC 21.04.090 and WCC 21.05.080 Water Supply.

²¹ FDO at 40-41, noting “rural character” requires “patterns of land use and development . . . consistent with the protection of natural surface water flows.”

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III. ORDER

Whatcom County is in **CONTINUING NON-COMPLIANCE** with RCW 36.70A.070(5) because the County failed to include measures in the Rural Element of its Comprehensive Plan protecting surface and groundwater quality, water availability, and water for fish and wildlife. This matter is remanded to the County to take action to comply with the Growth Management Act pursuant to the following schedule:

Item	Date Due
Compliance Due on identified areas of non-compliance from the June 7, 2013 FDO	February 14, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	February 28, 2014 ²²
Objections to a Finding of Compliance	March 10, 2014
Response to Objections	March 20, 2014
Compliance Hearing (Location to be determined)	April 1, 2014 10:00 a.m.

DATED this 10th day of January, 2014.

Nina Carter, Board Member

Raymond L. Paoletta, Board Member

Margaret Pageler, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²³

²² If the County has not taken action by this date, then they must submit a compliance work plan.

²³ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.